

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

RECEIVED

MAY 17 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:

REVIEW OF THE COMMISSION'S
REGULATIONS GOVERNING ATTRIBUTION
OF BROADCAST INTERESTS

) MM DOCKET No. 94-150
) MM DOCKET No. 92-51
) MM DOCKET No. 87-154
)
)

To: The Commission

DOCKET FILE COPY ORIGINAL

**COMMENTS OF THE
FREEDOM OF EXPRESSION FOUNDATION, INC.**

Respectfully submitted,

FREEDOM OF EXPRESSION FOUNDATION, INC.

David M. Hunsaker

PUTBRESE & HUNSAKER
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean VA 22101
(703) 790-8400

May 17, 1995

TABLE OF CONTENTS

SUMMARY	ii
STATEMENT OF INTEREST	1
I. INTRODUCTION	3
II. SPECIFIC RECOMMENDATIONS	5
A. THE ATTRIBUTION BENCHMARK FOR VOTING STOCK FOR BOTH "ACTIVE" AND "PASSIVE" INVESTORS SHOULD BE INCREASED	5
B. THE SINGLE MAJORITY SHAREHOLDER EXCEPTION TO THE VOTING STOCK ATTRIBUTION RULES SHOULD BE RETAINED	6
C. OWNERSHIP OF NON-VOTING STOCK IN A BROADCAST ENTITY SHOULD REMAIN NONATTRIBUTABLE	8
D. LIMITED PARTNERSHIP INTERESTS THAT SATISFY THE REQUIRE- MENTS OF RULPA OR OTHER STATE LAW SHOULD BE MADE NONATTRIBUTABLE	10
E. LLC'S AND RLLP'S SHOULD BE TREATED THE SAME AS LIMITED PARTNERSHIPS FOR ATTRIBUTION PURPOSES	12
F. THE COMMISSION'S CROSS-INTEREST POLICY SHOULD BE ELIMINATED	14
G. THE NEWSPAPER-BROADCAST CROSS-OWNERSHIP RULE SHOULD BE ELIMINATED OR SUBSTANTIALLY RELAXED	22
CONCLUSION	30

Summary

In these Comments, Freedom of Expression Foundation, Inc. sets forth specific recommendations concerning the updating and modification of the Commission's Broadcast Ownership Attribution Rules and Policies.

FOE's specific recommendations are consistent with its general objectives of seeking to expand the First Amendment rights of the electronic media. The relaxation or elimination of overly rigid and outmoded ownership attribution policies should be pursued by the Commission in this Rule Making.

More specifically, FOE urges the Commission to take the following steps: (a) increase the attribution benchmark for voting stock for both "active" and "passive" investors; (b) retain the single majority shareholder exception to the voting stock attribution rules; (c) continue to treat non-voting stock in a broadcast entity as nonattributable; (d) relax the insulation criteria for limited partnership interests to be consistent with the requirements of RULPA or other state law; (e) impose no greater restrictions on limited liability companies or registered limited liability partnerships than on limited partnerships with respect to insulation criteria; (f) eliminate the remaining elements of the Cross-Interest Policy as outmoded and unnecessary, and take no additional steps to create additional levels of regulatory barriers to ownership beyond the rules set forth in §73.3555; and (g) recommend to Congress that the Newspaper-Broadcast Cross-Ownership Rule should be eliminated or substantially relaxed.

The country is on the verge of a revolution in the form and structure of communications, and the Commission has recently made numerous policy statements in support of increased competition and less regulation. For the Commission to leave in place regulations that limit broadcast licensees to single-channel, analog communications, while at the same time allowing companies with

new technologies to deliver digitized multi-channel programming by wire, cable or over-the-air radio transmission would be to effectively destroy the broadcast industry—an action, if not an outright “taking” under the Fifth Amendment, then certainly one tantamount to a denial of equal protection of the laws, as well as a denial of broadcaster’s rights of freedom of expression.

While the present Rule Making Proceeding cannot address all of the changes required to allow broadcasters to compete fairly in a multi-channel, digital communications market, the modification or elimination of current attribution policies is a good place to start.

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C

In the Matter of:)	MM DOCKET NO. 94-150
)	MM DOCKET NO. 92-51
REVIEW OF THE COMMISSION'S)	MM DOCKET NO. 87-154
REGULATIONS GOVERNING ATTRIBUTION)	
OF BROADCAST INTERESTS)	

To: The Commission

**COMMENTS OF THE
FREEDOM OF EXPRESSION FOUNDATION, INC.**

FREEDOM OF EXPRESSION FOUNDATION, INC. ("FOE"), by Counsel, and pursuant to Section 1.415 of the Rules¹ hereby respectfully submit these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released January 12, 1995, concerning proposed changes in the Commission's Regulations and Policies Governing Attribution of Broadcast Interests, Investment in the Broadcast Industry, and the Cross-Interest Policy.²

STATEMENT OF INTEREST

1. **FOE.** FOE is a private membership corporation which seeks, through research and educational programs, to preserve and advance the First Amendment rights of the mass media, particularly the electronic mass media, and the freedom of the press, both print and electronic, from governmental intrusion in the editorial process and the dissemination of information by the press to the

¹47 C.F.R. §1.415.

²FCC 94-324, 60 FR 6483, MM Docket No. 94-150 (Released January 12, 1995) ("NPRM"). The NPRM also seeks comment on the Commission's regulations and policies affecting investment in the broadcast industry (MM Docket No. 92-51) and whether the Commission's cross-interest policy should be modified or abandoned (MM Docket No. 87-154). These pre-existing proceedings are being consolidated into the present docket.

public. FOE's members and contributors include private foundations, publishers of daily newspapers, broadcast licensees, cable MSO's and program suppliers, trade associations for broadcasters and newspapers, regional telephone companies, and other corporate entities which generally support the research and educational objectives of FOE. FOE has participated in numerous Commission proceedings in the past, with a view toward assisting the Commission to develop a full and complete record concerning the First Amendment implications of public policy alternatives. Given the vast changes in the communications industry during the past two decades, which have resulted in a substantial increase in the diversity of information and outlets of communication, First Amendment considerations require the FCC to revise and "modernize" its broadcast ownership attribution rules and policies, including cross-ownership regulations, and to eliminate its cross-interest policy.

2. FOE has a direct interest in the development and maintenance of a competitive system of diverse video delivery technologies, and supports the adoption of policies by the Commission that would promote diversity through the lifting of artificial barriers on the ownership and control of video communications entities, which inhibit the full and robust exercise of freedom of expression by these entities.

3. More specifically, in response to the Commission's *NPRM*, FOE believes the following changes should be made in the Commission's ownership attribution, media cross-ownership, and cross-interest policies:

- (a) The Commission should adopt rules increasing the attribution benchmark for voting stock for both "active" and "passive" investors.
- (b) The Commission should retain the single majority shareholder exception to the voting stock attribution rules.

- (c) Ownership of non-voting stock in a broadcast entity should remain nonattributable.
- (d) Limited partnership interests that satisfy the requirements of RULPA or other state law should be deemed nonattributable.
- (e) No greater requirements should be imposed on limited liability companies or registered limited liability partnerships than on limited partnerships.
- (f) The Commission's Cross-Interest Policy should be eliminated.
- (g) The Commission should recommend to Congress that the Newspaper-Broadcast Cross-Ownership Rule should be eliminated or substantially relaxed.

FOE respectfully submits that modification of its ownership attribution, cross-ownership and cross-interest policies as outlined above would serve the stated public interest goals of promoting competition and diversity as well as encouraging more investment in the broadcast industry, and would eliminate or lessen significant and unjustified barriers to the exercise of First Amendment rights. The following analysis is advanced to support this thesis.

I. INTRODUCTION

4. The Commission's ownership attribution policies were last updated ten years ago, during a time when the communications landscape was vastly different than it is today. A key objective with which the Commission was concerned at that time – diversity of voices in the marketplace, has been attained, and the country is on the verge of developing an entirely new communications infrastructure, which will render many of the ownership restrictions meaningless.

5. While FOE commends the Commission for seeking to liberalize some of its more extreme and anachronistic regulatory policies, in a real sense, what the Commission is proposing is minimalist tinkering — absorption with rearranging the deck chairs on the Titanic — when the entire regulatory framework needs dramatic and immediate attention.

6. As noted by G.A. Keyworth, II, Chairman of the Progress and Freedom Foundation in a special "Issue Forum" section of the Washington Post,

.... The US regulatory system, conceived and designed for analog technologies available during the New Deal, is the greatest roadblock to our continued leadership in the information age.

Since 1934, the world has witnessed a revolution in technology here and in space, but our regulatory system remains unchanged. Regulators, regardless of intentions, are enmeshed within a system whose underlying premises and overt structure prevents deployment of new technologies, products and services.³

7. While the Commission is attempting to restructure, so as to develop the "Information Superhighway," there is the danger that it will leave the broadcast industry behind, mired in analog-based, New Deal regulations. This does a great disservice to the broadcast industry that has served this country so well in the past. Not only would it be a disservice, but FOE believes it would constitute an unconscionable denial of broadcasters' rights under the First Amendment.

8. While all of the problems of the present anachronistic regulatory structure cannot be addressed in the present Rule Making Proceeding, the Commission must begin somewhere. The instant Proceeding affords the

³G.A. Keyworth, "Let's Say Goodbye to the FCC," WASHINGTON POST, May 16, 1995 p. D-6, Col. 1.

Commission the opportunity to make a commitment to removing unnecessary and outmoded barriers to effective competition and freedom of expression. FOE respectfully urges the Commission the make that commitment.

II. SPECIFIC RECOMMENDATIONS.

9. In connection with the issues raised by the Commission in the instant Proceeding, FOE makes the following specific recommendations.

A. THE ATTRIBUTION BENCHMARK FOR VOTING STOCK FOR BOTH "ACTIVE" AND "PASSIVE" INVESTORS SHOULD BE INCREASED.

10. ***Voting Interests of "Active" Shareholders.*** For individuals and other entities not qualifying as "passive investors,"⁴ the Commission presently imposes a benchmark of 5% or greater voting interest in the capital stock of a company to be attributable. The ownership interests of persons holding less than 5% of the voting stock are considered nonattributable.

11. The Commission is considering, but does not specifically propose raising the voting shareholder benchmark from 5% to 10%.⁵ FOE urges that the benchmark be increased at least to 10%. As noted by the Commission in its *NPRM*, a voting interest of 10% or higher is a benchmark used by other federal agencies in determining whether or not ownership interests are attributable for certain purposes.⁶ In this connection, the Commission may wish to consider making a distinction between publicly held and closely-held corporations, allowing for a higher attribution benchmark in the closely-held corporation. While a 10% shareholder of a publicly-held corporation might, in some cases, be

⁴See Paragraph 12, *infra*.

⁵*NPRM*, ¶121.

⁶*NPRM*, ¶¶37-44.

able to exert some influence on company policy, seldom, if ever, could such a shareholder exert influence as a result of his or her ownership in a closely-held corporation of fewer than 25 shareholders. In such cases, the Commission should consider increasing the attribution benchmark to 25%.

12. ***Voting Stock Held by Passive Shareholders.*** For certain institutional investors (specifically limited to bank trust departments, insurance companies and mutual funds) which hold stock as "passive investors," the current benchmark for attributing an ownership interest is 10% or more of the voting stock. The Commission's rationale is that such institutions hold the stock for investment purposes only, and play no role in the active affairs of the communications company.⁷ While it is true that institutional investors seldom get involved in management, because they hold voting stock, the voting of such stock in proxy disputes could become decisive. Passive investors cannot therefore be regarded as equivalent to limited partners or other non-voting owners. However, the Commission may wish, once again, to consider whether the benchmark for passive investors should be different as between publicly-held and closely-held corporations. Once again, a higher percentage might be appropriate with respect to closely-held companies, since other individual shareholders are also likely to hold sizable percentages of the voting stock of such companies.

B. THE SINGLE MAJORITY SHAREHOLDER EXCEPTION TO THE VOTING STOCK ATTRIBUTION RULES SHOULD BE RETAINED.

13. With respect to closely-held corporations where a single natural person holds more than 50% of the voting stock, the current FCC attribution

⁷NPRM, ¶147.

policy is to treat the remaining 49% voting stock as being nonattributable.⁸ The rationale for this policy is that, even if all of the 49% shareholders voted as a block, they could not overrule the one 51% shareholder.⁹

14. The Commission expressed concern in the *NPRM* about whether this exemption should be limited, and if so, under what circumstances. It posits a situation where a 49% voting shareholder holds a larger percentage of the total equity, either in nonvoting shares or in debt financing, and whether, in such circumstances, there is a danger of influence upon the licensee greater than the 49% voting share would suggest.¹⁰

15. FOE would oppose any back-peddling or limitations on the single majority shareholder exception. The scenarios which the Commission seems concerned with in this context and as also expressed elsewhere in the *NPRM* have nothing to do with *attribution*, which is, and should remain, a *de jure* concept. Rather, they have to do with the *indicia* of *de facto control*, and whether or not an unauthorized transfer of control has taken place. Any such scenarios can be addressed and reached now and later through the Commission's investigations staff, and appropriate sanctions imposed against the offending parties. To replace a "bright line" *de jure* rule clearly understandable to all, with a vague, shifting standard of "totality of circumstances" is a serious mistake, both from a regulatory standpoint and from the standpoint of conserving Commission resources.

16. Moreover, if the Commission is concerned with the effect its ownership attribution rules have on capital investment, this is one instance where proposed limitations will have a predictable negative effect. Equity investors are

⁸47 CFR §73.3555, NOTE 2(b).

⁹*NPRM*, ¶51.

¹⁰*Id.*

not about to make such investments where their ownership of a less than controlling interest is subject to the vagaries of a shifting and uncertain "potential for influence" standard.

17. Finally, from a First Amendment viewpoint, every limitation on the ownership of electronic mass media is a limitation on a party's freedom of expression. The Commission cannot justify further limitations on the single-majority shareholder exception on the basis of what *could* happen in a few scenarios.

C. OWNERSHIP OF NON-VOTING STOCK IN A BROADCAST ENTITY SHOULD REMAIN NONATTRIBUTABLE.

18. Under current attribution rules, the ownership interests of persons holding non-voting stock are not attributable.¹¹ Nor is non-voting stock with rights to convert to voting stock cognizable until such time as the conversion right is exercised. The Commission has invited comment on whether or not non-voting stock should be attributable. It cites, as an area of concern, the situation where the largest equity share of the corporation is held in the form of non-voting stock by a single shareholder, and whether in such circumstances, there are grounds to believe that undue influence on licensee operations could result.¹²

19. If non-voting stock should be found to be attributable, the Commission also wants to know in what circumstances it should be cognizable. For example, it has asked whether the same, or a higher benchmark be used for non-voting as is used for passive investors.¹³ Finally, the Commission has asked

¹¹47 CFR §73.3555, Note 2(f); *NPRM*, ¶52.

¹²*NPRM*, at ¶53.

¹³The Commission also noted that in other communications services, a 5% *equity* benchmark, rather than a voting benchmark is used, and asked whether that is relevant when considering attribution rules for broadcasting. *NPRM*, ¶54.

whether such cases be examined on a case-by-case basis, and if so, would the added regulatory burden and degree of uncertainty be outweighed by other public interest factors.¹⁴

20. The Commission has always stated that it is primarily concerned with who has the practical voting control over the policies and operations of a broadcast entity. In the case of a stock corporation, this means the *voting* stock. The primary purpose of a corporation issuing not-voting stock is to raise capital in the form of long-term investment without giving up *control* over the operations of the company. Typically, preferred, and other nonvoting stockholders are guaranteed a greater return at less risk than the voting shareholders as the *quid pro quo* for foregoing voting rights. From the investor's point of view, the purchase of nonvoting, but preferred stock may also be preferable to a voting position, from the standpoint of limitations on investment through nonassessable shares, and decreased exposure to liability in situations where the corporate veil is otherwise pierced.

21. Should the Commission decide to attribute such nonvoting interests for purposes of its multiple ownership rules, there is a very real danger that it could adversely affect the amount of capital available to corporations engaged in broadcast enterprises. This is in direct contrast to the Commission's stated objective in this Proceeding, and certainly would not be in the public interest.

22. The concerns expressed by the Commission regarding nonvoting equity interests are also misplaced. The few cases where abuse may be found are easily reachable through present policies against unauthorized transfers of control. There is a substantial body of case law developed over a number of years in the areas of unauthorized transfers and "real party-in-interest" that provide sufficient

¹⁴*Id.*, ¶54, Note 108.

standards as well as guidance for any Commission investigation or fact-finding necessary when possible abuse is discovered.

23. It may very well be that "money talks..." However, the likelihood for undue influence by equity investors is decreased in an environment where there are diverse sources of funding for broadcast enterprises. Should Investor A demand too many concessions as a condition for the use of his money, the company can approach Investor B. The attribution of nonvoting equity interests would tend to decrease the number of funding opportunities for capital investment precisely because the voting shareholders do not want to give up control.

24. Accordingly, FOE recommends that no change be made in the present attribution policy for nonvoting equity interests.

D. LIMITED PARTNERSHIP INTERESTS THAT SATISFY THE REQUIREMENTS OF RULPA OR OTHER STATE LAW SHOULD BE MADE NONATTRIBUTABLE.

25. Because of the ability of a partner to act for, and bind a general partnership, the Commission presently considers all partnership interests as being attributable, regardless of the percentage of equity held, except for sufficiently insulated limited partnership interests.¹⁵

26. Limited Partners in a valid limited partnership are treated like non-voting stockholders of a corporation. However, the Commission requires a greater degree of insulation of limited partners from the general partners and the operations of an LP than under the laws of most states. Limited Partnership licensees must provide written certification on FCC ownership reports and transfer

¹⁵NPRM, ¶55.

and assignment applications that the limited partners are precluded from directly or indirectly controlling the management or the day-to-day operations of the licensee company.¹⁶ This includes voting on the election and removal of general partners except to replace a general partner who has died or resigned.

27. The Commission has indicated that it does not intend to modify the current policy of attributing *any* percentage of a *general* partnership interest, no matter how small. However, with respect to limited partnership interests, it is considering taking two actions that would have the effect of relaxing the attribution criteria for limited partnership interests. First, with respect to *business development companies* (*i.e.*, companies that inject capital into or otherwise invest in newly emerging or start-up companies), the Commission proposes to modify the insulation criteria to permit limited partners to vote on the election and removal of general partners.¹⁷ Under federal and state regulatory schemes limited partners in business development companies must be afforded this right. Second, the Commission has asked whether it should create a *benchmark* for widely held limited partnerships that would make limited partnership interests of less than, *e.g.*, 5%, 10%, or 20% nonattributable.¹⁸

28. FOE recommends that the Commission should not only relax its insulation criteria for limited partnership interests to accommodate state and federal requirements in business development companies, but should go further, in relaxing its insulation criteria to match that required under the Revised Uniform Limited Partnership Act (RULPA), requiring the licensee to certify only that the limited partnership meets the requirements of the limited partnership statute in

¹⁶The seven specific "insulation criteria" are set forth in ¶55, Note 110 of the *NPRM*.

¹⁷*NPRM*, ¶56.

¹⁸*NPRM*, ¶¶59-61.

the state of registry. There is no reason to establish and enforce a more rigid federal standard for FCC purposes than is in place under valid state law. The choice of business entity is a business decision, motivated by business and tax reasons rather than specific licensee accountability. In the case of limited partnerships, the Commission can safely rely on the natural proclivity of limited partners to maintain their limited liability and thus comply with all state requirements of insulation from, and passivity in, a partnership's day-to-day management and operations. Moreover, inasmuch as limited partnerships and other entities with elements of limited liability for equity investors has grown out of a need to raise capital, a second layer of limitations and restrictions at the federal level—in addition to tax treatment—is both unnecessary and counterproductive to the Commission's stated goal of promoting capital investment in the broadcast industry.

29. In this area as well as in nonvoting equity interests, the Commission has available policies and guidelines to monitor for potential abuse, and to take action, under the authority of §310(d) of the Act,¹⁹ when it appears that the putative manager-owners are not, in fact, in control of the broadcasting company. Accordingly, FOE supports relaxation of the insulation criteria presently used by the Commission in determining whether or not limited partnership interests are attributable.

E. LLC'S AND RLLP'S SHOULD BE TREATED THE SAME AS LIMITED PARTNERSHIPS FOR ATTRIBUTION PURPOSES.

30. Limited liability companies ("LLC's") are unincorporated associations, recognized and regulated by a number of states, that possess attributes both of corporations and partnerships. Because the use of LLC's is still new, the Commission

¹⁹COMMUNICATIONS ACT OF 1934, *as Amended*, 47 U.S.C. §310(d).

has no announced policy concerning the attribution of ownership interests in LLC's, but is dealing with them on a case-by-case basis.²⁰

31. Registered limited liability partnerships ("RLLP's"), which differ from LLC's in the amount of liability afforded to a partner, are also a new form of business association recognized by many states. As with LLC's there is no current FCC policy for attribution, and all partners are considered to have attributable interest in the absence of the Limited Partner insulation certification.

32. The Commission is tentatively proposing to treat LLC's and RLLP's the same as limited partnerships: members' ownership interests will be considered attributable unless they can certify to the practical insulation from the managing members, and from the day-to-day media activities of the company.²¹ The Commission has sought comment on whether this tentative policy is appropriate, and if so, whether the same insulation criteria should be used as with limited partnerships.

33. FOE supports the development of attribution policies which will encourage, rather than discourage innovative forms of business entities to attract capital investment. The development of these new or hybrid forms of business entity are in response to a changing environment in the marketplace as well as a to disparate and inequitable treatment of corporations versus partnerships in our present tax laws. The choice of business organization entity by a start-up broadcast company can well spell the difference in whether the business enterprise will be a success or failure. The Commission should relax or eliminate an unnecessary secondary layer of business entity qualification that has the effect of restricting the flow of capital for broadcast investment. Accordingly, FOE

²⁰NPRM, ¶64.

²¹NPRM, ¶69.

supports the adoption of a form of insulation certification that most closely approximates that of RULPA, for passive investors in LLC's, RLLP's, and other new forms of business enterprise.

F. THE COMMISSION'S CROSS-INTEREST POLICY SHOULD BE ELIMINATED.

34. The Commission originally developed the cross-interest policy in the 1940's as a supplement to the duopoly rule.²² Unlike the multiple ownership rules and other attribution policies, the Commission has always examined cross-interests on a case-by-case basis. Originally, the policy included "meaningful interests" in more than one station in a market. Meaningful interests then included positional interests, key employees (usually managers and persons having discretionary authority with respect to sales and programming), joint ventures, nonattributable equity interests, consulting positions, time brokerage agreements, and advertising agency representative relationships. While these interests were not prohibited outright, the existence of such an interest, coupled with another, attributable interest in the same market, required an *ad hoc* determination in each case, as to whether such a relationship was in the public interest.²³

35. In 1987 the Commission did away with much of the cross-interest policy as a result of the adopting in 1984 of the attribution rules, but did retain three elements: Key Employees, Nonattributable Equity Interests, and Joint Ventures. FOE believes that the time has come to eliminate these last vestiges of an outmoded and unnecessary policy.

²²NPRM, ¶178.

²³NPRM, ¶179.

36. **Key Employee Relationship.** The current policy regarding key employee relationships is that key employees (such as general manager, sales manager, program director) of one station are precluded from having an attributable equitable ownership interest in, or serving as a key employee of another station in the same community or market.²⁴ This policy does not apply, of course, to co-owned AM-FM combinations, grandfathered radio-TV or newspaper-broadcast combinations, or since September, 1992, same-service radio duopolies permitted under the new radio contour overlap rule.

37. The reasoning behind the Key Employee Cross-interest policy was that such interrelationships tended to depress competition and diversity, since key employees are in a position directly to influence the operations of the station where they work, and could do so in a manner as to protect the equitable investment in the other station in the same market. This cross-interest or conflict of interest, it was assumed, was so significant as to endanger the public interest and to require federal intervention through case-by-case analysis and enforcement.

38. The Commission has never developed any factual record that would support this assumption. And, as the Commission has been advised by the Circuit Court in another context, policies purportedly adopted as serving the public interest which rest on untested factual assumptions about licensee behavior, will no longer withstand judicial scrutiny under the rational decision-making standard.²⁵

39. FOE respectfully submits that continued enforcement of the key employee cross-interest policy is unwarranted and superfluous. Given increased competition in all radio markets, it is extremely unlikely that the owners or upper

²⁴NPRM, ¶82.

²⁵*Bechtel v. FCC*, 10 F.3d 875, (D.C. Cir. 1993)

management of a licensee would long tolerate an employee with mixed loyalties.²⁶ There is no need for the Commission to continue unnecessarily to deploy its limited resources on policies better administered in the private sector—especially when all branches of the federal government are being asked to make substantial budget cuts and eliminate unnecessary or counterproductive policies. Moreover, as a logical matter it is difficult to distinguish between a policy that permits joint sales arrangements and a policy that prohibits key-employee cross interests.

40. ***Nonattributable Equity Interests.*** Current Commission policy generally proscribes a situation where a person holds an attributable interest in one media outlet and a substantial (*i.e.* above 5%) nonattributable equity interest in another media outlet in the same market.²⁷ The Commission's concern in this situation is similar to the key employee policy, *i.e.*, that the person could use the attributable interest in the one outlet to protect the financial investment in the other outlet. Whether any equitable interest above 5% is substantial enough to trigger the policy is unclear, but recent experience suggests that a 20% nonattributable ownership interest has required Commission scrutiny and necessitated a waiver which would be readily granted where combined ownership, such as a duopoly was permissible. The policy is not invoked in the situation where each interest in the two different outlets are *both* nonattributable.²⁸

41. Again, FOE respectfully suggests that the Commission's resources would be better spent elsewhere. Retention of the "Nonattributable Equity

²⁶As noted by the Commission many companies, including CBS, Inc. have anti-moonlighting and conflict of interest policies that would prohibit the kind of cross-interests covered by the FCC's key employee cross-interest policy. *NPRM*, ¶82, and Note 135.

²⁷*NPRM*, ¶83.

²⁸*Id.*

Interests" portion of the cross-interest policy is sending conflicting signals to the broadcast industry and to the public. On the one hand, the Commission is declaring that a "nonattributable" interest is not to be considered or counted in determining whether or not a licensee is in compliance with the multiple ownership rules. On the other hand, it is saying, that such an interest *is* attributable for some purposes, *i.e.*, the *local* multiple ownership rules.

42. Further, to the extent a danger exists in such a situation, it is more often than not self-correcting, because the owners in control of Licensee A will not long tolerate a situation where a key employee, officer, director, or even minority shareholder is injuring the economic viability of the company solely to protect his or her "substantial," but nonattributable ownership interest in Licensee B. If such a party is in a position to control Licensee A, then other questions arise as noted above. A separate level of analysis and investigation is unnecessary and wasteful of scarce Commission resources.

43. ***Joint Venture Arrangements.*** Joint venture arrangements to buy or build a new broadcast station, cable television system, or daily newspaper in the same market are generally precluded under the cross-interest policy on the grounds that joint ventures required cooperative effort between broadcast entities that otherwise compete with one another.²⁹ Again, the reduction in program diversity was the justification for this limitation. Unlike time brokerage agreements and joint sales agreements, where one party is supposedly passive, the joint venture arrangement as defined by the Commission assumes that each licensee remains active with respect its own broadcast operations, while cooperating with the other party on a third broadcast or other media operation.

²⁹NPRM, ¶84.

44. The Commission has recently adopted rules concerning certain kinds of joint ventures such as Time Brokerage Agreements. To the extent that a joint venture between two licensees for a third broadcast enterprise is in the same market, such a venture is currently subject to the Commission's local multiple ownership rules. Assuming that the interests of the joint venture are "voting," or otherwise permit unrestricted participation by each of the joint venturers in the day-to-day operations of the third station, those interests are attributable and must comply with current ownership limitations. To the extent that the joint venturers have merely put up the capital and are effectively insulated from day-to-day management of the joint venture, their interests should be treated the same as limited partnership interests, and should not be attributable. There is no need for a separate level of scrutiny under a policy that has no clear-cut standards as to determine which joint ventures are permissible and which are not. Accordingly, the Commission's cross-interest policy on joint ventures should be eliminated as an unnecessary level of regulation and counterproductive to the goal of maintaining and increasing the investment of capital in broadcast enterprises.

45. ***Non-Equity Financial and Multiple Business Relationships.***

Although it once prohibited such relationships, the Commission has now recognized the value of certain contractual relationships between licensees that do not involve a joint venture.-- Under current policy, separately-owned radio stations are permitted to function cooperatively in terms of advertising sales, technical facilities, formats and other aspects of station operations so long as each licensee retains control of its station and complies with the Communications Act, other Commission rules and policies and the anti-trust laws.³⁰

³⁰NPRM, ¶94.

46. In addition, the Commission has continued to allow time brokerage agreements, also referred to as local marketing agreements ("LMA's") between licensees, although it imposed certain restrictions on such agreements between radio licensees where the stations involved are in the same market.³¹ At present there are no restrictions on LMA's between television licensees, or between a television licensee and a radio licensee;³² nor are television licensees prohibited from engaging in combination advertising and joint sales practices.

47. In the 1992 *Report and Order* which adopted special rules respecting time brokerage agreements between radio licensees, the Commission reiterated that it was not concerned with sales representation agreements, joint sales and advertising agreements and the like ("JSA's"), and would neither prohibit them nor make them subject to the ownership attribution rules, as they did not directly involve programming or licensee control over programming.³³ While the Commission has stated it does not propose to disturb its recent rule changes with respect to time brokerage agreements for radio, or to alter its policy permitting JSA's, it does seek comment, however, on whether separately owned stations could so merge their operations, through a variety of joint enterprises or cooperative agreements, perhaps in conjunction with other nonattributable interests, and thereby create such close business interrelationships as to implicate its diversity and competition concerns.

48. For example, prior to 1984, *debt* was considered to constitute an attributable interest in some contexts.³⁴ The Commission did away with this

³¹47 CFR §73.3555(a)(2).

³²The issue of LMA's between television licensees is addressed by the Commission in a separate Rule Making Proceeding, MM Docket 91-221.

³³*Revision of Radio Ownership Rules*, 7 FCC Rcd 2788-89 (1992).

³⁴*NPRM*, ¶97.

after concluding that, standing alone, debt financing was the least likely of all financing sources to involve an interest that implicates the multiple ownership rules, and that considering debt financing as an attributable interest would severely limit capital sources for broadcasters, most notably seller financing, where the Seller remains in the market with another property.³⁵

49. The Commission recognizes that banks and other lending institutions are less likely to be engaged in other business relationships with their debtors. Thus, the kind of relationship that might trigger the cross-interest analysis contemplated by the Commission would be one station that not only has a creditor-debtor relationship with another station in the same market, but has also entered into a joint sales relationship with that other station or leases tower and studio space to the debtor station, shares employees, etc. While not proposing to make debtholding, *per se*, an attributable interest, the Commission has asked for comment on whether substantial debtholding, when accompanied by a number of other close business interconnections, *e.g.*, joint facilities operation or a joint sales agreement, could trigger a cross-interest analysis.³⁶ At a time when the differences between debt and equity seem to be disappearing, the Commission wants comments on whether debtholders may be in a position to influence the operations of the licensee in core areas such as programming and competitive practices.

50. Thus, while no single relationship or activity may raise any question, the Commission has expressed concern that the combination of factors could implicate diversity and competition concerns, and undermine the integrity of the multiple ownership rules. Such concerns must necessarily be weighed against the

³⁵*Id.*

³⁶*NPRM*, ¶¶98-99.

possibility that such restrictions could inhibit the injection of needed capital in the broadcast industry, and that the case-by-case determination this would entail would create uncertainty in the industry (thus chilling investment perhaps even further) and would involve the expenditure of significant resources on the part of the Commission.³⁷

51. FOE believes that any attempt to define standards for what nonequity financial and multiple business relationships are permitted and in what combinations will create a regulatory nightmare that is fraught with peril. If standards are too rigid, they will not reflect the realities of the marketplace, and will have the effect of denying badly needed capital investment in broadcasting; if they are vague, or ambiguous, as they are wont to be, they will have the effect of creating such uncertainty in the financial and broadcast communities as to chill such investment.

52. As FOE has pointed out previously, there is absolutely no reason to develop a new set of standards and guidelines. To the extent that the relationships are so entangling as to constitute an improper delegation of licensee authority, the situation is reachable by reference to present Commission policies against unauthorized transfers. Where such relationships do not amount to an improper transfer or relinquishment of control, they should be left alone. The burden should be on those persons attempting to argue that the investing entity has become the entity controlling the day-to-day operations of the licensee.

53. Accordingly, so long as the contractual relationships between licensees and/or licensees and investors provide for the retention of control by the licensee over all nondelegable licensee functions and obligations, the Commission

³⁷*Id.*